

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 163

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., APPELLANTS

v.

RINGSBY TRUCK LINES, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION SUGGESTING AFFIRMANCE

This appeal seeks to set aside a decision of a three-judge district court (J.S. App. A) reversing and remanding an Interstate Commerce Commission order in *Increased Class & Commodity Rates, Transcontinental,* 326 I.C.C. 397 (J.S. App. B). The Commission ordered 1,400 motor common carriers to cancel, on or before September 12, 1966, a general three percent increase in their transcontinental[1] rates and

[1] "Transcontinental" traffic here refers to motor shipments transported in interstate commerce across an imaginary line extending through Denver, Colorado, by motor common carrier parties to certain tariffs of the Rocky Mountain Motor Rate Bureau.

charges. The Commission found that the carriers had failed to sustain the statutory burden of proving that the newly filed increases were just and reasonable, because (1) they failed to show that the sample group of 18 carriers which was studied was representative of all 1,400 carriers (326 I.C.C. at 405); (2) they failed to show that the period selected for study (one week for some data, one day for other data) was typical of a full year's operation (*ibid.*); and (3) various income and operating ratios of the carriers as a group, together with the absence of representative cost and revenue data, indicated that the motor carriers had not shown a revenue need for an increase (*id.*, at 406).

The Commission's order never became effective. After fifteen motor carriers filed a complaint seeking to enjoin the order, a judge of the United States District Court for the District of Colorado, on September 9, 1966, over the opposition of the government and the appellants, entered a temporary restraining order. The statutory three-judge district court continued the restraining order on November 4, 1966, and, after a hearing, entered a permanent injunction, holding that a "remand is necessary because the Court is unable to determine the real reasons for the Commission's holding" (J.S. App. A, p. 13), and directing the Commission on remand to "explain with some detail exactly how the carriers failed to prove their case, and what standards are being applied" (J.S. App. A, p. 14). On February 1, 1967, less than one month after the district court remanded the proceeding, the Commission entered a further report and order (J.S. App. C), at-

tempting to comply in full with the court's request for additional findings. The Commission again ordered the general increase cancelled but provided that the filing of a new complaint in the district court would automatically stay the effectiveness of its order. Such a complaint was filed in the District of Colorado by the same appellee motor carriers on February 27, 1967, thereby staying the effectiveness of the new order. This second suit is still pending in the district court.

Appellants raise two questions on this appeal: (1) Did the district court err in restraining enforcement of the Commission's order during the pendency of the case (September 9, 1966, to January 5, 1967)[1], and (2) did it err in setting aside the Commission's order and remanding to the Commission for clarification? We suggest that this Court might appropriately affirm the district court's order summarily because the first issue presents no substantial question warranting review and the second issue is moot.

1. The district court has express statutory authority to issue a temporary order restraining the effectiveness of an order of the Interstate Commerce Commission, 28 U.S.C. 2284. Whether the court will issue such an order in a particular case lies within its sound discretion. See *Stott* v. *United States*, 154 F. Supp. 389 (S.D. N.Y.). While we disagree with the court's finding that irreparable injury would result to the appellee-carriers if the Commission's order reinstating

[1] The temporary restraining order resulted in the continuance of the higher rates which the Commission had found to be unsupported by appellees' application.

lower rates were permitted to become effective, we cannot say it was so unreasonable, in the light of plaintiffs' showing, as to be clearly erroneous. This question is not moot, because it would affect appellants' claims for restitution of charges paid under the increased rates; but in our view it does not warrant plenary review by this Court.

2. The district court's ruling on the merits—that the Commission's final order was fatally unclear—is moot. The Commission's speedy issuance of a new order designed to meet the court's objections renders any disagreement with the court's action of merely academic interest. Review by this Court at this stage would thus serve no useful purpose. See *Boston & Maine R. Co.* v. *United States*, 358 U.S. 68.

For these reasons, we believe that summary affirmance of the district court's order would be appropriate.

THURGOOD MARSHALL,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

JULY 1967.

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